March 24, 2005

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Public Utility District #1
Dates of Filing:	January 18, 2005 February 23, 2005
Case Numbers:	TFA-0084 TFA-0089

This Decision concerns two Appeals that were filed by the Public Utility District No. 1 of Snohomish City, Washington (hereinafter referred to as "the District"). The first Appeal (TFA-0084) was filed in response to a determination issued to the District by the Special Assistant General Counsel, Bonneville Power Administration (hereinafter referred to as "BPA"). In that determination, BPA replied to three requests for documents that the District submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. BPA released certain documents in their entirety to the District, and withheld other material pursuant to Exemption 5 of the FOIA. This Appeal, if granted, would require that BPA release the withheld information. In the second Appeal (TFA-0089), the District contests BPA's assessment of fees for processing its requests in Case No. TFA-0084, and five other requests.

The FOIA generally requires that documents held by federal agencies be released to the public on request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information that agencies are not required to release. The FOIA also provides for the assessment of fees for the processing of requests for documents. 5 U.S.C. § 552(a)(4)(A)(i); see also 10 C.F.R. § 1004.9(a). However, the DOE will grant a full or partial waiver of applicable fees if disclosure of the information sought in a FOIA request (i) is in the public interest because it is likely to contribute significantly to public understanding of the activities of the government, and (ii) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii).

I. Background

In its FOIA requests, the District sought access to "all written and electronic documents, including communications between BPA, members of Congress (or their staffs) and the [DOE] or any other federal power marketing agencies concerning P.L. 106-377, Title III, § 311 (Energy and Water Appropriations Act of 2001) before and after passage." *See* November 16, 2004 letters from Michael Goldfarb, Counsel for the District, to Annie Eissler, FOIA Officer, BPA. In its response, BPA identified a number of e-mails and documents as responsive to the District's request. Portions of

some of the e-mails were redacted from the material provided to the District because they consist of information that is not responsive to the request. In addition, five e-mails were withheld in their entirety under Exemption 5. * Those e-mails, all sent on June 22, 2000, were from

1. Randy Roach, General Counsel, to Jeffrey Stier, Vice-President, National Relations, providing legal advice on proposed legislative language;

2. Roach to Stier, with attachment of alternative proposals for legislative language;

3. Stier to Roach, requesting that Roach draft legislative language along the lines cited in the communication;

4. Stier to Roach requesting legal review of suggested change in legislative language; and

5. Stephen Wright, Senior Vice-President, Corporate, to Roach and Stier providing Wright's views and suggestions on various alternatives for legislative language.

In its Appeal of BPA's FOIA determination (Case No. TFA-0084), the District challenges the adequacy of BPA's search for responsive documents and the adequacy of the agency's justification for withholding e-mails one through four. The District also contests BPA's decision to withhold portions of certain communications because they were found to be unresponsive to the District's requests. The District asks that it be provided with any responsive documents that are not properly subject to withholding under Exemption 5 and with an adequate justification for any withheld material.

In its submission in Case No. TFA-0089, the District contends that the BPA incorrectly classified it as a "commercial use" requester, and contests what it claims is BPA's rejection of its request for a fee waiver.

II. Analysis

A. Adequacy of the Search

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord, Weisberg*

---

*/ In its Determination Letter, BPA identified six e-mails as being withheld in full under Exemption 5. However, BPA has informed us that the e-mails identified as (b) and (e) are identical, and that, therefore, only five e-mails were withheld. BPA Response at 4.

v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982).

In support of its claim that BPA's search was inadequate, the District points out that it did not receive copies of any communications between BPA and Congress or the DOE concerning the legislation in question. Because "[i]t is unlikely that BPA did not communicate with any members of Congress or with the [DOE] in formulating its plan to get [the] legislation passed,"Appeal at 1, the District concludes that BPA's search was deficient. Moreover, the District points out that it did not receive copies of two responsive communications that were referred to in material that the District did receive.

In its February 25, 2005 Response to the District's Appeal (Response), BPA described the search that was performed. Because the subject of the District's requests involved the national legislative process, BPA stated, the number of BPA employees who "may have been involved is quite limited. These were the Administrator and Deputy Administrator; the staff of our Washington, D.C. Office in the Forrestal Building; the BPA General Counsel; [the author of the Response] (as the attorney working on RTO matters); and the two leaders of BPA's RTO project at that time. Personal files of these officials and employees, both electronic and hard copy, were reviewed as were official files." Response at 1-2.

BPA further responds that, contrary to the District's assertion, BPA provided copies of two communications with or from the DOE concerning the legislation in question. Those communications are (1) a July 14, 2000 memorandum about the legislation from Roger Seifert in BPA's Washington, D.C. office to various DOE officials, and (2) a May 16, 2000 memorandum from T.J. Glauthier, DOE Deputy Secretary. The absence of other such communications between BPA and Congress or between BPA and other parts of the DOE is not unusual, BPA states, because matters involving national legislation are handled through the Washington Office, and the practice of that Office is to avoid maintaining copies of informal written communications with congressional offices or DOE staff. BPA e-mails that are deleted from a user's computer are erased from the system after 90 days. Response at 2.

With regard to the District's contention that BPA's search was inadequate because two communications that were referenced in material provided to the District were not located, BPA replied that it conducted another search for these two communications, without success. *Id*. With regard to the second referenced communication, which was between Mark Maher of BPA and certain public utilities, BPA opined that what "likely happened was that Mr. Maher distributed, in person at a regular filing utility meeting, copies of the proposed legislative language (which is cited verbatim in the e-mail chain provided to [the District]) to the filing utility representatives without an accompanying memorandum or description." Response at 3.

After careful consideration of the Appeal and BPA's Response, we conclude that BPA's search was adequate. BPA's description of the scope of the search convinces us that it was reasonably calculated to locate the requested documents. Furthermore, the District's arguments do not lead us

to believe that a further search would be likely to result in the identification of additional responsive materials. We therefore reject the District's challenge to the adequacy of BPA's search.

B. BPA's Withholding of Non-Responsive Material

Next, the District contends that BPA lacked the authority to withhold portions of the e-mails provided to the District because they consisted of information that is not responsive to the FOIA requests. However, in *Northwest Technical Resources, Inc.*, 28 DOE ¶ 80,119 (2000), we upheld the withholding of non-responsive information from documents provided to a FOIA requester. The District has not convinced us that our holding in that case is incorrect. E-mail chains, such as those in question here, routinely contain information on a wide variety of subjects. We conclude that BPA properly redacted non-responsive information from the documents provided to the District.

C. BPA's Application of Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears)*. The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "pre-decisional" privilege. *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*). The District does not challenge BPA's withholding of e-mail five under the deliberative process privilege of Exemption 5. Moreover, BPA has now abandoned any reliance on the attorney work product privilege as a ground for withholding e-mails one through four. Response at 4. Therefore, only BPA's application of the attorney-client privilege is at issue here.

The attorney-client privilege protects from mandatory disclosure "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Central, Inc. v. United States Department of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). Although it fundamentally applies to facts divulged by a client to his attorney, the privilege also encompasses any opinions given by an attorney to his client based upon, and thus reflecting, those facts, *see, e.g., Jernigan v. Department of the Air Force*, No. 97-35930, 1998 WL 658662, at *2 (9th Cir. Sept. 17, 1998), as well as communications between attorneys that reflect client-supplied information. *See, e.g., Green v. IRS*, 556 F. Supp. 79, 85 (N.D. Ind. 1982), *aff'd*, 734 F.2d 18 (7th Cir. 1984) (unpublished table decision). Not all communications between attorney and client are privileged, however. *Clarke v. American Commerce National Bank*, 974 F.2d 127, 129 (9th Cir. 1992). The courts have limited the protection of the privilege to those communications necessary to obtain or provide legal advice. *Fisher v. United States*, 425 U.S. 391, 403-04 (1976). In other words, the privilege does not extend to social, informational, or procedural communications between attorney and client. *Government Accountability Project*, 24 DOE ¶ 80,129 at 80,570 (1994).

Applying these criteria to e-mails 1-4, it is apparent that they consist almost entirely of communications between an attorney (General Counsel Randy Roach) and his client (BPA) in which BPA asks for, and receives legal advice about a legal matter (*i.e.*, proposed legislative language). It is this type of communication that the privilege was designed to protect. However, our review of the e-mails reveals that there are portions that are social, informational or procedural in nature. These portions are not exempt from mandatory disclosure under the attorney-client privilege and must therefore be provided to the District. They are (i) the last two sentences of the 6:17 a.m. e-mail from Jeffrey Stier to Randy Roach (e-mail number three); (ii) the 3:21 p.m. e-mail from Roach to Stier (without the attachment containing the four legislative alternatives authored by Roach) (e-mail number two), and (iii) the first and last sentences of the 2:24 p.m. e-mail from Roach to Stier (e-mail number one).

In its Appeal, the District correctly points out that the privilege applies only to confidential communications, and that BPA's determination did not indicate whether these e-mails were in fact confidential. However, based on representations made to this Office by BPA, we conclude that these e-mails have been treated as confidential by BPA. *See* memorandum of March 18, 2005 telephone conversation between Steven Larson, BPA and Robert Palmer of this Office. With the exceptions noted above, we conclude that BPA properly applied the attorney-client privilege in withholding the e-mails in question.

D. The Assessment of Fees for Processing the District's FOIA Request

In its Appeal in Case No. TFA-0089, the District contests what it claims is BPA's January 26, 2005 denial of its request for a fee waiver. In the alternative, the District contends that BPA improperly classified it as a "commercial use" requester for purposes of calculating fees.

Contrary to the District's claim, our review of BPA's January 26 letter convinces us that it was not a final determination of the District's eligibility for a partial or full fee waiver, but was instead a request for more information. The letter states, in pertinent part that upon

> review of your FOIA requests, it does not appear that you have met the burden of establishing that you qualify for a reduction or waiver of fees for the requested information. *At this time, we are offering you the opportunity to provide additional information to demonstrate that you qualify for a reduction or waiver of fees.* The FOIA provides for a reduction or waiver of fees, but only if a requester shows that disclosure of the information (1) is in the public interest, because it is likely to contribute significantly to the public understanding of the operations or activities of the government; and (2) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii).
>
> In order to satisfy the public interest, a requester must show each of the following:

> (A) The subject of the requested records concerns the operations or activities of the government;
>
> (B) Disclosure of the requested records is likely to contribute to an understanding of government operations or activities;
>
> (C) Disclosure of the requested records would contribute to an understanding of the subject by the general public; and
>
> (D) Disclosure of the requested records is likely to contribute significantly to public understanding of government operations or activiities.

10 C.F.R. § 1004.9(a)(8)(i). If a requester satisfies the four factors of the public interest, he must then satisfy the commercial interest factor by showing that disclosure of the information is not primarily in his commercial interest. 10 C.F.R. § 1004.9(a)(8)(ii). Factors to be considered in applying these criteria include but are not limited to:

> (A) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so
>
> (B) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.
>
> ***

We will not proceed further on your FOIA requests until (1) *you provide additional information so that we may evaluate your request for a waiver or reduction of fees, and if denied then* (2) your willingness to pay estimated processing fees, or (3) narrow the scope of your FOIA requests.

January 26, 2005 letter from Annie Eissler, BPA Freedom of Information Officer, to Michael Goldfarb, Counsel for the District (italics added).

Under section 1004.8(a) of the DOE's FOIA regulations, a requester may file an Appeal with the Office of Hearings and Appeals "when the Authorizing Official has denied a request for records in whole or in part or has responded that there are no documents responsive to the request consistent with Section 1004.4(d), or when the Freedom of Information Officer has denied a request for waiver of fees . . . ." Because BPA's FOI Officer has not denied the District's request for a fee waiver, the circumstances necessary for an Appeal do not yet exist in Case No. TFA-0089. We will therefore dismiss this Appeal without prejudice to refiling should BPA deny the District's request.

Accordingly, the District should attempt to demonstrate to BPA that its request satisfies each of the criteria that are set forth in its January 26 letter and reproduced above.

Because the issue of whether BPA properly categorized the District as a "commercial use" requester is likely to arise again in the event that BPA denies the District's fee waiver request, we will address that issue here. The FOIA delineates three types of costs--"search costs," "duplication costs," and "review costs"--and places requesters into one of three categories that determine which of these costs a given requester must pay. If a requester wants the information for a "commercial use," it must pay for all three types of costs incurred. In contrast, educational institutions and the news media are required to pay only duplication costs, and all other requesters are required to pay search and duplication costs but not review costs. 5 U.S.C. § 552(a)(4)(A)(ii); 10 C.F.R. § 1004.9(b).

The District argues that because it is a non-profit, publically owned utility, its requests are "not for a use or purpose that furthers a commercial, trade, or profit interest." Appeal in Case No. TFA-0089 at 2. Accordingly, the District contends that it falls under the "all other requesters" category. However, the District's status as a non-profit is not dispositive of this issue. Many non-profits engage in trade or commerce, and BPA could have properly concluded that the information requested would be put to a use that would further a commercial or trade interest. As a public utility, the District is engaged in the business of selling electricity and water to its customers. Depending on the manner in which the District intends to use the material that it requested, BPA could have properly concluded that the FOIA requests were made in furtherance of the District's commercial interests.

However, it is not clear that BPA considered the manner in which the District would use the requested information in concluding that the District is a commercial use requester. BPA has informed us that it reached this conclusion because "we know our customers." *See* memorandum of March 3, 2005 telephone conversation between Joseph Bennett, BPA and Robert Palmer, OHA Staff Attorney. It therefore appears that BPA may have based this decision solely on its knowledge of the District's business activities without considering the manner in which the District intended to use the material requested. Section 1004.2(c) of the DOE's FOIA regulations provides, however, that "in determining whether a requester properly belongs in [the commercial use] category, agencies must determine how the requester will use the documents requested." Therefore, if BPA denies the District's request for a fee waiver, it should also consider the use to which the District will put the information obtained in making its determination as to the proper fee category for the District's request.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Public Utility District #1, OHA Case Number TFA-0084, is hereby granted as set forth in paragraph (2) below, and is in all other respects denied.

(2) BPA shall promptly release the following to the District: (i) the last two sentences of the 6:17 a.m. e-mail from Jeffrey Stier to Randy Roach; (ii) the 3:21 p.m. e-mail from Roach to Stier (without

the attachment containing the four legislative alternatives authored by Roach), and (iii) the first and last sentences of the 2:24 p.m. e-mail from Roach to Stier.

(3) The Freedom of Information Act Appeal filed by Public Utility District #1, OHA Case Number TFA-0089, is hereby dismissed without prejudice to refiling upon the issuance of a final fee waiver determination by BPA.

(4) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 24, 2005

PALMER_____